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Vice Chancellor: Mr. Chancellor, The Honourable Robert Hetherington MLC, representing the Premier of Western Australia, The Honourable Andrew Mensaros MLA, representing the leader of the Opposition, distinguished guests ladies and gentlemen, may I welcome you very warmly to this tenth Walter Murdoch lecture and apologise to you for the fact that, alas, we're, we need to be twice as big as we are in order to accommodate all those of you who have come tonight. It's the best case that I've seen to put to the University's Council for a large assembly hall but alas it won't come before tomorrow morning.

I might say that it's a great pleasure to us to have here tonight Lady Murdoch and Dr Catherine King. We try to arrange the Walter Murdoch lecture as near as possible each year to Sir Walter's birthday, which was, I think, on the seventeenth of September.

Previous Murdoch lectures and lecturers, in doing honour to the memory of the man and the scholar whose name we bear, have reflected not only those fields of intellectual endeavour already represented on the campus but also areas of knowledge not yet fully established or even established at all in our schools. This year's lecture, like last year's foray into theology, indicates more of our academic aspirations. We look forward eagerly to the addition, in the very foreseeable future, of philosophy and law to our offering.

It's particularly appropriate, therefore, that we've invited as our speaker this evening, a man uniquely qualified to venture into thaat quagmire of human social sensitivities, the interrelations of law and ethics. The Honourable Mr Justice Michael Kirby came here four years ago to take part in a memorable debate with Senator Susan Ryan and I'm delighted to welcome him back to Murdoch. He's so well known that to sketch a curriculum vitae is almost an impertinence, but as he's a long way from home, can I say that he hails from Sydney, is a graduate of Sydney University who's kept close to the academic world. He was a fellow of the Senate and a member of the Faculty of Sydney Law, Law Faculty for several years and since 1978 he's been Deputy Chancellor of the University of Newcastle.

His legal career, of course, has been dominated by his now over eight years' service as chairman of the Law Reform Commission. That was preceded by five years practice as a solicitor and seven years at the bar, and by a brief spell as Deputy President of the Australian Conciliation and Arbitration Commission. He's been a member of the Administrative Review Council since 1976, and earlier this

year was appointed a judge of the Federal Court of Australia.

These are only some of Mr Justice Kirby's formal achievements and qualifications. The full list is a long one but I would prefer to introduce him to you as a person who, since being put into a splendid strategic position, has shown himself to be an indefatigable mover and shaker of our collective and individual consciences. I ask him now to deliver his Walter Murdoch lecture on Morality and Law: Old debate, new problems. Mr Justice Kennedy.

MK: Mr. Chancellor, Vice Chancellor, Lady Murdoch, ladies and gentlemen. As I listened to that introduction, I thought of what the Archbishop of Canterbury said on a similar occasion. He said that when extravagantly introduced, he felt he had to say two little prayers. The first was for his introducer for telling all those fibs, and the second was for himself because he enjoyed it so much.

Such is the relentless movement of time and the years, that Walter Murdoch is for me a name, not a person. I was born in the year he retired from the chair of English in the University of Western Australia in thirty-nine. By that time, he was sixty-five. He went on to continue his service to the university as a Senator and as Chancellor. He had come to the university is one of the first Professors in 1913. Through his hands passed generations of educated and civilized citizens of this state. He was a scholar of our century.

It was really after his retirement and during my childhood that Murdoch flourished as a public man. What a commentary it is on today's calls for early

retirement, that he was read more widely after seventy than before. There's a view in some educated circles, including, alas, in the legal profession, that attempts by educated people to communicate their thoughts to the general public are somehow in bad taste.

At the heart of this misconception is the purest form of intellectual snobbery. Attempts to talk about difficult, complicated and technical matters for a general audience are bound usually to lead to some oversimplification. Therefore, so it is said, we shouldn't try. We should content ourselves with debate with each other with scholars and with the learned.

Walter Murdoch would have none of this. In 1945 he commenced writing a weekly article in answer to questions posed by the general public. He was engaged in this enterprise for nearly twenty years. Listen to the typical comments he made when this venture was criticised by colleagues: quote "Such a lot of people have said or hinted to me that to write such things is beneath my dignity. I explain that I haven't any dignity. Anyhow, these disjointed notes are bringing me into contact with a lot of minds the reverse of the academic and it is doing me good whether it's doing them good or not."

According to Professor La Nauze, who inaugurated this lecture series, Murdoch offered his comments in answer to reader's questions with a consistent liberalism that gave the effort and intellectual coherency. La Nauze: "Of course he selected the questions he chose to answer, I suspect even made some up, so he could, for instance, speak out on the constitutional referendum of 1951,

which presented a cruel dilemma to men of liberal and democratic mind. Serious questions were taken seriously, difficult questions were not shirked. Some of the answers provoked virulent and even libellous abuse. Murdoch honestly asserted his own humane and liberal values, but he knew too well, the suburban spirit takes many forms."

In the same marvellous biographical note, Professor La Nauze offers two of Murdoch's ideas in his own words. They're relevant to my theme tonight, indeed I take them as my texts. Do not plainly acquiesce in what your elders say and merely imitate what your elders do, and unquestioningly adopt the life mapped out for you by the wisdom of your elders. And further, there are two sides to every question. I've always believed to insist on this truth, in season and out of season, is to play one's humble part in civilising one's country, for a civilised country is a country which weighs, without heat or passion, without violence, both sides of a question.

Now I try to follow these precepts in my own life. Indeed, the whole effort of the Australian Law Reform Commission is devoted to putting into practice these wise and kindly words. I draw four principles, at least, from Walter Murdoch's life and writings. First, strive boldly to do new things and do not be deterred by the doubters and the critics. They may suggest that the task, whether reform of the law or establishing a new university in an isolated and rustic community, is oppressive, daunting and even impossible. Second, don't believe that the educated scholar has nothing to leave, to learn from the ordinary citizen or nothing to impart to him. Murdoch in his weekly column, and the Law Reform Commission in its efforts to engage public attention to injustices and

inefficiencies of the law, embrace a common philosophy. This is, that ultimately those who have been blessed with gifts of high intellect and learned education must share those gifts. This isn't paternalism or condescension, it's the obligation that comes from the fact that we all live together in a civilised community.

Third, whilst accepting the learning and wisdom of the past, of the elders in Murdoch's case or great judges of our eight-century tradition in the case of law reform, we shouldn't be afraid in this generation and in a time of great change to take new directions. We are not the victims of our ancestors, helpless captives of the past. We are free individuals joined in a community with a high measure of self-erection and open government. And finally, we should never shirk difficult questions; we should confront them openly and honestly, doing the best we can with them, but we should do so in a temperate spirit, realising that there are often competing points of view. So far as may be, we should seek to reconcile the points of difference, but where fundamental differences remain, there should never be a crass effort to suppress legitimate conflicts in bland doublespeak. That's the most awful prospect of Orwell's nightmare. Instead, we should debate hard issues openly and honestly and, in the end, commit the resolution of differences to the decision of an informed community.

Any of you who know even a little about the work of the Australian Law Reform Commission will realise why I so strongly empathise with the philosophy of Murdoch. It is after all a confident and optimistic philosophy. One would have expected nothing else from the ninth son, and fourteenth and last child, of the

Reverend James Murdoch. James, as a young man of twenty-six, had come out into the Free Church at the disruption of the Church of Scotland in 1843.

I suspect that James Murdoch, confident in his simple Scottish faith, would have found most disturbing the matters that I will address tonight, but I'm sure that Walter would have applauded my chosen topic. Indeed, I feel that his spirit is with me, encouraging me to look at the sensitive and controversial issues that I plan to tackle. I'll seek to remember his instruction that on all of them there are two sides to the question, possibly more, and in a university worthy of his name we shouldn't retreat from legitimate participation in public controversy. This remains the way in which our civilization is pushed forward. In Australia it remains a unique institutional function of our universities to stimulate public controversy. Unhappily this is a function that is all too insufficiently performed.

Many people think of the law as some kind of elaborated Ten Commandments. They can see that it's rules as a kind of elaborate set of instructions on morality. Of course, there is and always has been an interaction between perceptions of morality and rules of law. Even the most primitive societies soon develop rules which reflect common perceptions of right and wrong. Protection of the lives of citizens, protection of their person against injury, protection of their immediate surrounding property and later protection of their reputations and transactions; these are the ways in which legal systems develop.

The English legal system, which remains the basis of Australian law, began in a close association between the church and the bench. The influence of specifically

Christian, and particularly Anglican church teachings, on the substantive law persisted long after all but formal separation of the church and state. Indeed, it's only in recent times that, with growing assertiveness, the English and Australian communities are moving away from the legal enforcement of morality in a number of spheres. The dilemma of our generation is how far this movement should go.

To that dilemma, the marvels of technology are now adding many new questions. They're certainly very difficult ones. These questions challenge the humane and liberal values in an even more acute way than ever did the anti-communist referendum of 1951. At stake is not only the tranquillity of political man, but the future of humanity, fashioned as some would say in the image of God.

Of course, the reality of the modern legal system is that there are many rules which are completely morally neutral. It’s usual to cite here the side of the road we drive on. In terms of morality, it doesn't really matter whether it's the left or the right, so long as there's a rule which is obeyed in the interests of the motorist and the pedestrian. I now feel that this illustration is no longer entirely value free. When Argentina invaded the Falkland Islands, the first thing that the conquerors insisted upon was that the peaceful Kelpers should immediately change and drive their few tractors on, and other vehicles, on the right. Doubtless the Argentinian commander did this in order to ensure that a tractor didn't collide with his troop lorries, but few instructions could have so mobilised British opinion. Somehow driving on the right seem terribly foreign, the ultimate insult to British people, and a fate so awful that a rescue operation had

immediately and triumphantly to be organised. But the point is properly made at the outset. The law is not simply an elaborated system for the enforcement of morality.

The overwhelming bulk of the law is morally neutral. It simply establishes rules for peaceful coexistence and for the peaceful resolution of conflict. Often perceptions of justice, fairness, due process and so on do permeate the design of the rules, but for the most part the rules themselves are morally uncontentious. They may be ineffective, inefficient, cumbersome or inaccessible but most of them could scarcely generate a debate about morality.

There is, for all this, a small and fairly readily identified area where the circles of law and private morality do intersect. I refer especially to the role of the law enforcing perceptions of sin, through the criminal law. The limits of the law's function in the enforcement of morals has been generally accepted for some time in the English legal tradition. Thus, punishment for adultery, still common in Islamic and primitive societies, has long since disappeared from the English criminal calendar. But it was not until 1975, with the passage of the Family Law Act, that adultery was removed entirely from the divorce law of the Australian scene. Fornication, so frequently denounced in the Judeo-Christian morality, is not, as such, a criminal offence. Perhaps as well that this is so. We certainly wouldn't have the resources to tackle so large a class of offenders.

However, the assertion of a new principle for the proper division between the criminal law and Judeo-Christian perceptions of morality was made in its most

telling modern form by the celebrated Wolfenden Committee, which in 1957 recommended changes to English law on the criminal penalties for certain homosexual practices. These practices were, and in many parts of Australia still are, punishable by the severest criminal penalties, but it was the Wolfenden Committee which nailed to the mast a new flag. It is this flag which is increasingly triumphant.

This was their assertion: quote, Wolfenden – The law's function as we see it is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others. It is not, in our view, the function of the law to intervene in the private lives of citizens, nor is it the function of the law to seek to enforce any particular pattern of behaviour further than is necessary to carry our purposes we have outlined. There must remain, said Wolfenden, a realm of private morality and immorality which is, in brief and crude terms, not the law's business.

This assertion, in brief and crude terms, of the limited function of the law in the enforcement of private morality was not a sudden invention of the members of the Wolfenden Committee, distinguished though they were. It traced its lineage to the teachings of Jeremy Bentham and John Stuart Mill. It's the principle of the Wolfenden Report, and its application in many areas of morality, presently still reflected in the criminal law, that is the focus of a great deal of public discussion and even political debate and discussion in our country.

In New South Wales, the former Speaker of the State Parliament, Mr Jim Cameron, has resigned from the Liberal Party and joined the Reverend Fred Nile in the Call to Australia political team. Mr Cameron describes himself as the watchdog for community values and, quote, "an activator, a detonator of the new surge of moral values". Quote - this is Mr Cameron – "There is a tremendous surge in the old values flooding back, as it is seen that the emptiness of the permissive society has yielded nothing of substance. Muscular Christians as I call them. You see them on the beaches, you see them all over the place. This man here, Mr Nile, has fire in his belly and I make no bones about it, I have fire in my belly" end of quote.

Mr Cameron told the New South Wales Parliament on the eighteenth of August last, that he intended to propose a motion to the parliament to, quote, "show whether or not this is a parliament which accepts Jesus Christ as its lord and master." Consistent with this approach, to the interaction between perceived Christian values and lawmaking, Mr Nile endeavoured to get the Australian Broadcasting Tribunal to ban a recent documentary, *Kids of the Cross*, which portrayed the actual lifestyle of young unemployed people in Sydney's Kings Cross district. Mr Nile and Mr Cameron are hard at work campaigning against the equal rights legislation promised by the Federal Government, and there are, of course, equivalent moves in all parts of Australia to mobilise what is boldly called the moral majority.

Supporters constantly refer to the evidence that Australians are still overwhelmingly theist and not humanist. They refer to the high proportions who give a stated religion in the census form. They could also refer to the findings of

a recent Australian Gallup Poll, which disclosed that eighty one percent of Australians, believe in God fifteen do not believe in God and four percent are unsure. According to the same poll fifty five percent of Australians believe in life after death, thirty four percent do not believe in life after death. Seventy per cent of Australians believe that the Bible contains the authentic word of God, forty two percent believe in the devil. This poll shows a slight slippage since the last poll was conducted in 1974, but Gallup reports, quote, "Belief in all four tenets of faith were expressed strongly amongst Roman Catholics and Baptists and amongst recent churchgoers." They were also somewhat stronger amongst Liberal National Party voters than A.L.P. voters. Few significant differences occurred by states or between city and country areas.

So this, ladies and gentlemen, is the Australian society we have, and because British society was very similar, a conflict between the Wolfenden Principle and society's adherence to Christian values led critics to question whether Wolfenden and his colleagues had got it right.

Among the most distinguished Wolfenden critics was Lord Devlin, one of the finest English judges of this century. In a lecture soon after the Wolfenden Report, Devlin asserted that the effort to withdraw the law from the realm of private morality had led him to the conviction that the Wolfenden ideal was not only questionable but wrong. Lord Devlin argued that society has a right to punish conduct of which its members strongly approve, disapprove, even though that contact has, conduct has, no effects that can be deemed injurious to others.

The basis of the right to punish is that the state has a role to play as a moral tutor. That criminal law is the proper tutorial technique of the state in upholding the strongly held perceptions of morality shared by its people. Commentators from the opposite point of review, of view, have regarded this as an eccentric viewpoint but it's certainly not regarded as eccentric by Mr Cameron or Mr Nile, nor by their thousands of supporters throughout Australia. It's not regarded as eccentric by the proponents in Ireland of the constitutional change recently approved at referendum. This change will enshrine in that country's basic law the moral position of the Catholic Church in respect of abortion. The basic argument is that society has a right to protect its own existence. The majority, so it said, has a right to follow its own moral convictions in defending the social environment from changes which the majority oppose, however much others more closely affected want to be let alone by the law.

Lord Devlin's assertion that the right of society to enforce its perceptions of morality through the criminal law acknowledged that there were occasions where the law should nonetheless stay its hand. It should do so where it detected uneasiness, or half-heartedness, or latent toleration in societies condemnation of a particular practice. But where public feeling was high, enduring and relentless, where it gave rise to intolerance, indignation and disgust, society's right to act through the criminal law could not, according to Devlin, be denied. Lord Devin applied this thesis to homosexual conduct. If it was genuinely regarded as an abominable vice, society could and should act through its criminal law to punish the unacceptable.

Devlin's assertion provoked Professor Hart to respond. He contended that the distinguished Law Lord’s criticisms rested on a confused conception of what society was. According to Hart, there was simply no evidence to support a threat to society or its danger from the private conduct of a minority group. Furthermore, Hart doubted society consisted of, furthermore, Hart doubted, society consists not just of a mixture of variable individuals but of a complex of moral ideas and attitudes which its members happened to hold at a particular moment of time. It was intolerable, according to Hart, that such a moral status quo should have the right to preserve its precarious existence by force.

Lord Devlin returned to this debate and joined issue, quote, “I don't assert that any deviation from society’s shared morality threatens existence, any more than I assert that any subversive activity threatens its existence. I assert that they're both activities which are capable in the nature of threatening the existence of society, so that neither can be put beyond the law.”

This debate attracted many commentators. Professor Ronald Dworkin, for example, offers this view, quote, “Lord Devlin concludes that if our society hates homosexuality enough, it's justified in outlawing it and forcing human beings to choose between the miseries of frustration and persecution. He manages this conclusion without offering evidence that homosexuality presents any danger to society's existence beyond the native, naked claim, that, quote, “Deviations from a society’s shared morality are capable by their nature of threatening the existence of society.””

This then is the intellectual background for an ongoing modern debate including in Australia. It's a debate with relevance far beyond the significance for homosexual conduct laws. In a country whose overwhelming majority still say they believe in God, and accept the hereafter and the Bible, should the criminal law remain a mechanism for the enforcement of aspects of personal morality taught by the organised expositors of the religious beliefs of the majority, or is there a limit, which is, crudely and bluntly, not the business of the law?

The battle lines are clearly drawn. The debate continues and we've seen many signs of the debate in Australia in recent months. Take for example our laws on gambling. Now you and I may regard gambling as the very definition of boredom. Yet for many Australians, deprived of any real prospect of earning wealth by years of patient achievement, gambling represents a tiny pathetic ray of hope. The prospect of winning the lottery, of backing the trifecta, of guessing the lotto, of seeing his dog come home; these are the dreams of suburban Australians. Last week it was reported that in Queensland, a lizard was so for more than a thousand dollars, because it raced well. Australians just like to gamble and I wouldn't be for a moment surprised if a dollar or two changed hands over the America's Cup race.

Yet the law circumscribes gambling in Australia in detailed, complex and institutionalised ways. There are special gaming squads, police full time engaged in upholding laws on gambling. A recent review by the South Australian Law Reform Committee disclosed a curious way in which many old English laws, designed to suppress this gambling spirit, may still exist in Australia. Royal tennis for example, outlawed as a questionable sport in the reign of King Henry

VIII, is probably still perfectly illegal in part for this country.

This could be amusing were it not for the differential application of the law on people amazed to find that a card game at home can be a criminal offence. On the twenty-eighth of February 1983, the Special Gaming Squad in New South Wales burst into the Coogee home of the leading Australian jockey Malcolm Johnston. People present were hauled before the Central Court, their names and ages were published all in the local papers. Their offence, playing an unlawful game of Manila.

At first, the participants thought someone was playing a joke on them when the police arrived. Solemnly, Sergeant Buchele of the Special Gaming Squad entered with his warrant, seized a quantity of playing cards and chips. A fine of a hundred dollars was imposed on the ringleader. Fines and bonds were imposed on the others. Matilda Maloof, sixty-eight, home duties at Major Street, Coogee, was excused, you'll be pleased to hear, the magistrate not proceeding to a conviction because of her age.

What an astonishing and remarkable case this is. How clearly does it raise the debate about the limits of the enforcement of morality? What business is it of the law to send its hard-pressed and expensive officers into a peaceful suburban home of people playing a card game, however foolish and tiresome? Is this really a matter of enforcing outrage sentiments of an angry moral Christian people opposed to the wickedness of gambling? What was so anti-social about their conduct that it warranted the intrusion into a private home by the agencies

of the state? Is that the inability of the state to tax such a private gambling activity that necessitates the continuance of this law, or is it more likely merely the persistence of a law designed to reflect earlier attitudes of society. still with us because no one would bother to address its reform?

Soon after this raid, the report of Justice Xavier Connor into the establishment of a casino in Victoria was published. The report rejected the casino on broad social and economic grounds, yet this rejection didn't depend upon the religious ground submitted to the judge that gambling was an evil in itself which the law should proscribe. The Roman Catholic journal in Melbourne, The Advocate, comments, quote, "Is this good enough? Some might feel that the main goal of the churches was to obtain the recommendation that the time, new type of gambling be not introduced into Victoria and that the grounds upon which this was achieved, provided they were respectable, was immaterial but this evaluation would not satisfy everyone. Many churchmen and churchwomen would feel that it was a loss to the prophetic function of the churches that moral arguments based on religious grounds were dismissed. Even worse it creates a precedent for dismissal of the religious contribution to subsequent inquiry".

The Victorian Government accepted the Connor recommendations, but the conclusions of Justice Connor were questioned in an editorial in the Melbourne Age, quote, "Those expressing a conservative viewpoint appear to have been better organised and better briefed than their opponents. We believe that Judge Connor has made an unduly pessimistic view of the ability of society to cope with the problems that might emerge from the introduction of casinos. If society can

handle other forms of gambling, and there are many in this state, why should it not be able to absorb casinos under strict government controls? Should not an individual have a right to patronise whatever form of gambling he chooses provided it's not harmful to others?".

So there you have it. On the one hand, The Advocate asserts the right of people with a religious viewpoint of fundamental morality to have their opinions reflected in the law against gambling as such. The secular newspaper asserts almost in the language of John Stuart Mill - if it is a self-regarding activity, if it doesn't harm others, what business is it of the law to intervene and prevent a person pursuing that activity?

As if in compensation for the rejection of the casino, the Victorian Government announced immediately the establishment of a separate inquiry into poker machines. That inquiry is now proceeding in Victoria. Interestingly, on the second of September 1983, the New South Wales Government forbad police experts from New South Wales from giving evidence to, or speaking on, matters of policy or expressing private views. We don't want these Victorians digging around, was the interpretation of counsel assisting the poker machine inquiry.

Also in apparent compensation for the hard line taken on casinos was the immediate announcement that Victoria is planning to open up a number of beaches to nude bathing. A nudity, in brackets prescribed areas close bracket, bill was introduced into the Victorian Parliament. Reflecting the ambivalence of society on such matters, the Melbourne Sunday Observer published a solemn

case against nude beaches beside a near-nude bathing beauty asserting nude bathing is ok if done in private.

Nude beaches are permitted in a number of the warmer Australian states but here again, representatives of the moral majority attacked the proposed change of the law. It was not enough for them that the beach should be isolated, that the area should be well marked, that a minority should want the facility, even that evidence could not establish any link between such features and crime. To the opponents, it is offensive that immodesty should be condoned. It threatens the tradition of modesty and it may become catching, diverting young people, especially, from chaste behaviour into the promiscuous habits that are found so unacceptable. It's on this basis that the opponents assert the right to continue the prosecution of public indecency and to do so even when the only people offended by the nudity are those sitting safely in their homes, contemplating with horror the decline and fall of civilisation in the sunshine.

What of pornography? Australians, so it seems, are spending more on video cassette tapes per capita than are Americans. It's accepted, expected that half a million video cassette recorders will be sold in this country this year. According to industry sources in July 1983, pornography, distributed by major companies, comprises about ten per cent of the videocassette market in Australia. The proportion of the market devoted to pornography is growing rapidly in the United States and is now a major sector of the cable television industry.

Federal and state Attorneys General of Australia, meeting in July 1983, agreed to a plan that will see hardcore videos given a special X qualification, on the basis that they're a class which wouldn't be accepted even in a cinema R classification. Sale of X-rated video cassettes will be prohibited to minors but so long as the video's classified, the new code would exempt retailers from prosecution under current obscenity laws for sale to consenting adults.

This approach to the so-called adult entertainment secured the approbation of a number of editorialists. The Sydney Morning Herald commented "A policy of rigorous censoriousness needs to be balanced by the fact that, whether one likes it or not, it's pointless to ban video material that can be seen live in theatres in Kings Cross and Oxford Street.

However, though that may be the video, the view of an earnest editor, the laws remain unreformed. Six weeks earlier, a motel proprietor in a country town in New South Wales was charged with screening pornographic films late at night on closed circuit television to guests in his motel. The chief of the Sydney C.I.B. Vice Squad, Detective Inspector Sheppard, said that the squad had stayed at the hotel in western New South Wales and had been told a blue movie service was available in the rooms on specific request. Twelve people were charged under the Indecent Articles and classic, Classified Publications Act and a large quantity of videotapes was confiscated.

In Britain, Mrs Thatcher announced at the same time that legal curbs on the sale of pornographic videotapes would be introduced in England. She made this

announcement after a Conservative M.P., Mr. John Townend, spoke of, quote, “growing public concern about the availability of videotapes featuring hard pornography”. Between Mrs. Thatcher's approach, to ban and criminally punish video pornography, and the Australian Attorney General's approach to classify, prohibiting only a very few, is a world of difference. It is, in essence, the difference between the Devlin assertion of the right of organised society to enforce its moral code, and the Wolfenden claim that this right has its limits.

Wolfenden would say that if adult people in a lonely country hotel room deliberately choose to take access to video pornography without having it forced on them unwillingly, then that is their affair. So long as they're adults and in private, the state should simply mind its own business. Mrs Thatcher and her government feel otherwise. They fear, presumably, the erosion of public morality, the destruction of right-thinking attitudes and the propagation of unhealthy sexual desires. One response to these debates, one’s response, depends in part upon the view taken of the proper limits of the criminal law and of the power of the organised state.

The same debate continues in relation to prostitution. In Victoria, a working party has been established to recommend how to use planning controls to regulate the location of massage parlours, often but not always associated with prostitution. In New South Wales, a state parliamentary committee is investigating prostitution. This investigation follows statements in March 1983 by the New South Wales Premier Mr. Wran. Mr. Wran told State Parliament that no law would wipe out sex and prostitution, and that it was better to contain prostitution to the Darlinghurst area of Sydney. They were here, said Mr Wran,

from the arrival of the First Fleet and they will be here forever.

The Opposition introduced a bill to give police greater powers in dealing with prostitutes and urged the government to harass and drive out the prostitutes in Darlinghurst. Mr Wran said that prostitution was a safety valve for the protection of women in the city. According to Mr Tim Moore, the Opposition spokesman, there were at least a hundred and three brothels within the Sydney City Council area. The government admitted to only thirty-four.

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he said.

In a number of parts of Australia, local residents, anxious about the establishment of massage parlours in residential areas, have taken to local protest and even photography of the clientele. Armed with placards reading Purity not Pleasure, Illicit Sex is Wicked, and Think God, a group of twenty-five citizens spend a number of cold evenings in August 1983 outside a new massage parlour in a Melbourne suburb. With a certain relish, the Sunday Telegraph reported that the owner of the establishment, Malcolm Childs, claimed that the publicity generated would do him nothing but good. Meanwhile hundreds of good citizens continue to keep the prostitutes in business.

So far as I've seen no one has asserted yet the Wolfenden principle to the New South Wales inquiry. Safer by far to refer to practicalities; it can't be wiped out, protects decent women, it’s a kind of public service. Had he been asked, I feel sure that Lord Wolfenden would have said this: So long as it's in private and between adults, it is simply not the law’s business. Attempts to enforce the law will fail. It will be enforced in an idiosyncratic way. It will undermine respect for the law and the honesty of officials. Notably, yesterday afternoon, as I prepared to come here, the Sydney banner headlines claim that police were receiving what were called “freebies” from Sydney prostitutes, presumably in order to turn a blind eye.

Moves towards the Wolfenden approach on drug laws can now be seen cautiously and timidly in our country. In Victoria, the State Government

introduced new legislation on marijuana. The bill doesn't legalise the possession of marijuana, nor does it condone its cultivation in small quantities. These remain criminal offences, though of a relatively minor order. The approach of the Victorian Government is substantially to reduce the penalties for the possession of marijuana, separate, separating completely the penalties incurred for the private use of the drug and those incurred for trafficking.

Soon after this announcement, the South Australian Health Minister, Dr Cornwall, said he would support the motion and would consider introducing a private member's bill to reform South Australia's laws on private use of marijuana. The Federal Minister of Health, Dr Blewett, said that he would consider calling a meeting of federal and state Attorneys General and Health Ministers to consider reform of marijuana laws. The leader of the Opposition in Queensland is reported as saying that the party would move, if elected, to decriminalise the smoking of marijuana, and to remove the stigma and job loss that now occurs with convictions involving the drug. A call was made for the introduction of the Victorian modest reforms in New South Wales, but one unnamed government source declared, quote, “If we can't even get homosexuality decriminalised, how can anyone possibly expect the decriminalisation of marijuana?”. Legalisation of marijuana for personal use was strongly opposed by the Police Department in New South Wales and the State Minister for Health announced that the criminal laws would not be changed.

An attempt last year by the Australian Foundation on Alcoholism and Drug Dependence to promote a serious national debate on Australia's laws on marijuana failed. He was undermined by extravagant press coverage and

inflammatory, scaremongering, ill-informed commentary by people who should have known better. Yet nowhere in that debate did anyone really tackle the central issue of principle raised by the Wolfenden report. I know of no one in the anti-smoking lobby today who'd suggest that the destructive effects of nicotine and alcohol should be forbidden in the private home. The experiment in alcohol prohibition in the United States was a brave experiment, but it ultimately collapsed because it couldn't be enforced and was producing too many undesirable social consequences.

Even those who'd forbid smoking in public places, and endeavour to curtail advertising smoking, particularly in conjunction with sporting events, would normally concede the right of smokers and drinkers to pursue their activities, if adults, in private. Shouldn't the same principle apply in the case, at least, of marijuana? Now I'm second to none in my opposition to smoking in public. It invades my space, I have my rights, I'm entitled to look to society to protect my space and my rights, but in private, is it the law's business?

Do we pay too high a price for this endeavour to enforce but a segment of private morality about drug use. Do we undermine respect for the rule of law by the differential way in which we allow social acceptability of some drugs, yet severely punish others? In a time of unemployment, is the criminal conviction too high a penalty on young people, blighting their careers? Is the difference between the criminal law and perceptions of morality in young, amongst young people encouraging breaches of the law, alienating them from law-abiding society and inspiring bravado? Does it cause the destruction of police morale and

even undermine the honesty and integrity of public officials? If these things happen, they’re high prices to pay, but to some they're worth paying because they underline the right of a moral community to prevent further erosion of right conduct by the spread of new drugs.

And as if these difficult problems weren't controversial enough, now our generation is faced by numerous bioethical quandaries. Should we permit in-vitro fertilisation, or is this an unnatural creation of human life in a test tube, demeaning and destructive of the Creator’s order of things? Should we permit scientists to take us down the track of cloning of the human species? Should we permit the growing of the human foetus to provide body parts for people in need of body parts? Should we permit manipulation of DNA, genetic engineering and the ownership and patenting of life forms? Should we condone neonaticide, in the case of children born with gross physical or mental disabilities? Should we, by law, permit sexual reassignment? Problem in the news last month when a South Australian unmarried mother sought to have her fifteen-year-old baby's sex change officially recognised.

Should parents be able to forbid school and health authorities giving contraceptive advice to their children or is this an unacceptable intrusion by the state into the legitimate domain of the family? Should a lover be able to forbid the abortion of a child he’s fathered, even though the mother wishes the abortion to be performed? Should the law change to permit the recognition of de facto relationships for at least some legal purposes?

These and other issues related to biology, sexuality and society are now crowding upon us. All too often the law is silent on these matters. When answers must be found, we turn to busy judges in the midst of crowded work dockets. With no common morality or plainly accepted guiding principle, how does a judge in a secular community respond to these questions? Lord Devlin would point him to the churches and to the good opinion of moral citizens. Wolfenden would point him to the limited function of the law to intervene in our lives, to restraint and to permitting individ, individuality to flourish so long as it does no harm to others.

Well, what conclusions should be drawn from this necessarily brief and unsatisfactory review of the intersection of law and morality in Australia today? First, it does seem clear that the debate is hotting up. In the one camp, the political spokesmen of the so-called moral majority are now better organised, more vocal and more aware of the political clout that comes to minority parties in closely contested electorates. Anyone who doubts the power of single-issue groups in a democracy should reflect for a moment on the impact of the conservationists on the recent federal election and the anti-abortionists in the preceding Victorian poll. Lord Hailsham, the Lord Chancellor, has said recently that these minority groups threaten democracy but they assert that they merely practice democracy. It's clear that in a politically polarised community, these small groups can enjoy an importance far beyond their actual numbers.

Secondly, and despite the rallying cry of the moral majority, I believe it can be said that the battle call of the Wolfenden Committee is still having its effect throughout the English-speaking world. People of liberal persuasion are asking

with increasing insistence, what business it is of the state to enter into bedroom. What business is it of the police to burst into a domestic suburban cottage to break up a nine-member card game? What right is it that the state should prosecute people watching blue movies in a country motel? What warrant has the state for punishing people for pursuing their sexual preference over which for the most part they have no control? These questions are now being asked and from the law they require answers.

Thirdly, there's a growing realisation, even by some who would support the old standards of morality, that the law is really an imperfect mechanism for enforcing that morality. You may discourage some people from smoking marijuana but many will still do so. You may discourage some people SP booking, book, book, booking. But according to reports, I don't even know the verb, but according to reports, hundreds of thousands of Australia are simply not deterred. You may arrest a few but millions of dollars will be spent on porno movies and on prostitution. In the personal realm, private conduct doesn't readily adjust to legal rules where participants don't feel that what they're doing is the proper province of the law, or really wrong.

Fourthly, a serious institutional problem is emerging in Australia. In part it's the response by cautious politicians, democratically accountable, to the sensitivity of these debates. All too often politicians of all political persuasions tend to shy away from the issues that I've been addressing tonight. Where they do seek to bring the law into closer harmony with modern social attitudes, they sometimes fail lamentably or succeed half-heartedly. The best recent illustration of this

assertion is to be found in the failure of the New South Wales Parliament to remove the criminal penalties on consensual homosexual conduct.

More than twenty years after Wolfenden, we're still talking about this reform in a number of parts in Australia. Yet in New South Wales, within weeks of the rejection of the reform of the criminal law, anti-discrimination laws were enacted to forbid discrimination against homosexuals. The criminal law pulls in one way, discriminal, discrimination law pulls precisely in the opposite direction, and this is where law reform bodies can come to the rescue of democratic parliaments.

Let's be candid, politicians need help in confronting the problems I've outlined, whether in the fields of private morality or in the fields of bioethics. These questions are just too sensitive, too controversial, too complex and too painful for politicians, unaided, to tackle. Left to themselves, I fear the quest for a short-term political advantage will, all too often, be seductive. It will overwhelm the dispassionate scrutiny of both sides of the argument for which Sir Walter Murdoch called.

To make parliaments work better should be the aim of all true democrats in Australia. The answer to the questions I raised tonight could be found in the democratic parliaments, rather than in the unelected judiciary or the enthusiastic and committed bureaucracy. Yet unless parliaments are given help, they're likely to put these issues to one side. Doing nothing is always the easiest course in politics. Removing disparities between the criminal law and modern morality is a

painful duty, but a duty nonetheless, of a legislature relevant to today's needs.

Inattention to reform of the law or to development of new laws on the subjects I've canvassed is a product of ambivalence in society about the limits of the function of the law in enforcing morality, but it's also, more significantly, a product of the failure of our democratic institutions to adopt means to keep the law in tune with community attitudes and practices. Those who seek to hold the line for the old morality will rejoice in the ineffectiveness of our institutions to change but this satisfaction must surely be tinged by a realisation that the distance between what the law says and what is actually happening is a formula for individual injustice and institutional erosion.

For every card payer arrested, hundreds will go free and they'll look on the law with contempt. For every SP operator detected, hundreds ply their trade with the support of thousands of their fellow citizens. Every prostitute arrested and fined, hundreds offer their services weekly to thousands of good fellow citizens. For every homosexual arrested, thousands pursue their activities. For every viewer of porno movies caught in a raid in a country motel, thousands go home and switch on the recorder every night, asserting their belief that the law should simply keep out of their private lives.

We lack a coherent principle and just stumble from one reform to another, our politicians treading warily and cautiously if it all. Yet there are consistent principles. They are, as Murdoch saw them, the two sides of the argument. For some, it's a simple matter of upholding Christian values and the right of society

to denounce and punish disgusting and unacceptable conduct. For others, it's a deep commitment to the limited role of the state. It's also a belief that as long as adult individuals don't hurt others, they should be allowed to do as they please.

It's my hope that the Law Reform Commission can help the political process to address these issues and in a consistent way, to reform the law and to modernise its rules, but we shouldn't deceive ourselves that in questions of the kind I've been addressing, there are simple answers that will appeal to everyone. There are matters upon which our society will divide deeply and even bitterly. We should seek to understand each point of view but in the end, I suspect a choice must be made. Seeing that choice clearly and realising its importance is an imperative. Were he alive today, I have no doubt that Walter Murdoch would be contributing to this debate, and I have little doubt as to the side he would take in it.

Wolfenden raised a battle flag. The skirmishes continue but the main battle still lie ahead.

VC: I know ask Professor Doug Savage, Professor of Psychology and Dean of the School of Social Inquiry to propose to a vote of thanks.

DS: I'd like, on behalf of Murdoch University and the audience here tonight, to thank the Honourable Mr Justice Kirby for what has been, I'm sure you all agree, a very stimulating and interesting talk. I think it's a sign of the importance and

impact of the Murdoch lecture that not only do we have Mr Justice Kirby to speak to us but that we have such a large audience for him to speak to and I'm sure you'll agree that he has not in any way reduced the importance and impact of those lectures.

I confess I had a great deal of trepidation coming down those stairs thinking what I ought to say, it's a difficult act to follow. It’s even worse when I realised that Mr Justice Kirby gives two hundred or more lectures per annum, and I thought well really this puts professors in a very difficult situation because our Vice-Chancellor is bound to work out very quickly, even with the numerical mind of a political scientist, that this is the annual number of lectures he recommends that professors should give. Justice Kirby does this is a sideline, beside his main, main occupation.

The topic too, of course, was extremely topical. The recent plight of OO7, and many other problems of late, perhaps suggest that morality and the law is a thing that we all are seriously going to have to consider very frequent intervals.

I would like, therefore, on behalf of the Murdoch and the audience and Murdoch University to thank you for this stimulating talk and to perhaps end by what I think is the greatest compliment and that is that, there were many questions I'd like to ask you and I know other people would too, but the point of the Murdoch lecture is that we shouldn't, the success of it is that we would like to.

VC: Ladies and gentlemen, I hope you'll join us for supper in the refectory. I wonder whether I could ask those who were sitting on the steps just along there if they would mind going out first and then if the rest of the audience would remain in their places until the official party has left. Thank you very much.

End of Transcription